

SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 582

CONTINENTAL CASUALTY COMPANY
and
FIDELITY AND CASUALTY COMPANY OF NEW YORK,
Appellants,

v.

THE ROBERTSON LUMBER COMPANY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

APPELLANTS' RESPONSE TO MEMORANDUM FOR THE UNITED STATES

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Appellants believe the statement of the Solicitor General that the instant case does not raise "federal questions of sufficient prospective significance to warrant plenary consideration by this Court"—a determination to be made by this Court—stems from a misplaced focus and disregard of the posture here of the case; from the irrelevant conclusion that Capehart housing laws are a dead letter, and from an erroneous assumption that dual notice provisions of the bond are unique to Capehart military housing.

This is not an appeal simply seeking review of the judgment of the North Dakota Supreme Court, as though upon

an original holding by it respecting the notice provisions of the bonds without regard to the federal statute authorizing the bonds and the action of the federal agencies in promulgating them, or apart from the final determination in the prior federal action of the validity of those notice provisions and of the requirement of compliance therewith as a condition precedent to a right of action thereunder. Accordingly, the focus should be on the decision of the North Dakota Supreme Court as one in contravention of the Supremacy Clause of the Constitution in refusing to give validity and enforceability to a federal statute and to the action thereunder of federal agencies in prescribing forms of bonds to be used in the military housing program of the United States, and also on a decision of a state court deliberately refusing to give *res judicata* effect and full faith and credit to a prior federal court decision and final judgment upon the same claim and demand.[1]

It is the necessity continuously to safeguard the supremacy of the authority of the United States, in its domain, from nullifying or eroding action thereof by state authority, which is paramount and of "prospective significance." As so viewed, the case presents substantial federal questions of prospective significance, as the possibility always exists that a state court may do those things complained of here by appellants. Indeed, both the Supremacy Clause of the Constitution and the very statute under which the jurisdiction of this Court is invoked, 28 U.S.C. 1257(1) and 1257(2), envisage those possibilities as continuing.

For over 90 years this Court has reviewed decisions of state courts which refuse or which appear to refuse to give effect to the judgment of a court of the United States rendered upon the point in dispute and with jurisdiction of the case and of the parties.[2]

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[1] See particularly quotation from opinion of the court below, page 9 of the Jurisdictional Statement.

[2] *Dupasseur v. Rochereau*, 21 Wall. (88 U.S.) 130 (1875). See cases cited at the bottom of page 11 of appellants' jurisdictional statement.

It is irrelevant that the Capehart housing laws appear now to be a dead letter. The relevant concern is not what brought about the action of the court below, but what was the consequence of its judgment. If a state court may nullify a federal statute and the action of the federal agencies thereunder, as was done by the court below, and may outrightly deny full faith and credit to the final judgment of the court in a prior federal action, as was also done below, all without the restraint of review and corrective action by this Court, any federal statute and federal agency action and any final judgment in a prior federal court suit may be subject to the same end result.

In footnote 3, the Solicitor General remarked that the Eighth Circuit dismissed Robertson's complaint on the ground that the notice provisions in the Miller Act did not apply to Capehart Act bonds. The real ground of decision was that the notice provisions were valid and were a condition precedent to recovery by Robertson, which had not complied therewith. *Continental Casualty Company v. United States,* 305 F.2d 794 (see J.S. 101-111), certiorari denied, 371 U.S. 922.[3]

Importantly, the Solicitor General states (page 4) the court's holding below "that a suit on a Capehart Act bond was not precluded by the failure of the materialman to comply with the bond's notice provision thus raises a federal question which might well merit plenary review." He con-

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In *Angel v. Bullington,* 330 U.S. 183 (a reverse situation in which a federal court failed to give full faith and credit to a prior state court decision), this Court said (p. 185) that the failure to dismiss the action on the ground that the judgment in the North Carolina court precluded the right thereafter to recover on the same cause of action in the federal court, presented an important question in the administration of justice.

[3]Notice provisions in policies and bonds for many years have been held to be conditions precedent to liability and recovery. See, e.g., *Imperial Fire Insurance Co. v. County of Coos,* 151 U.S. 452, 462; *United States Shipping Board Merchant Fleet Corporation v. Aetna Casualty & Surety Co.,* 98 F.2d 238.

cluded, however, that because of the discontinuance of Capehart housing projects, the federal questions raised by this case do not *appear* to be of prospective importance.[4]

Although such conclusion seems irrelevant, appellants apprise the Court that the United States Department of Housing and Urban Development, Federal Housing Administration, Payment Bond, FHA Form No. 2452-A, in use by the FHA on housing projects, after defining a claimant as "one having a direct contract with the Principal or with a subcontractor of the Principal for labor, material, or both, * * *," provides in paragraph 3 of the conditions in pertinent part as follows:

> "3. No suit or action shall be commenced hereunder by any claimant:
>
> "a) Unless claimant, other than one having direct contract with the Principal, shall have given written notice to any two of the following: The Principal, the Owner, or the Surety above named, within ninety (90) days after such claimant did or performed the last of the work or labor, or furnished the last of the materials for which said claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the materials were furnished, or for whom the work or labor was done or performed. * * *"

The same provisions for dual written notice are in the American Institute of Architects labor and material payment bonds.[5]

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[4] Earlier (page 4), the Solicitor General said that the Capehart Act payment bonds were *designed* by the Department of Defense. In fact, the payment bond was promulgated by the Secretary of Defense following consultation with a number of other federal agencies and lending institutions. See *Continental Casualty Company v. C. O. Brand, et al.*, 355 F.2d 969, 972; footnote 8 to that opinion shows that the bond had to be satisfactory to the Commissioner of the FHA, who insured the loan. The bond (J.S. 85-88) is designated as FHA Form No. 2452-CP.

[5] See The American Institute of Architects Labor and Material Payment Bond, AIA Document A311, September 1963 edition, paragraph

Moreover, the Department of Defense, in waiving the requirement of a performance and payment bond in all cost-reimbursement type construction contracts, nevertheless requires such cost-reimbursement type prime contractor to obtain performance and payment bonds for any fixed-price construction subcontract exceeding $2,000.[6]

Post Office Department Labor and Material Payment Bond, Form No. 1414-E, January 1965, for construction in its commercial leasing program, with the United States as the formal obligee, likewise has, in paragraph 3(a) thereof, the requirement of dual written notice to the principal and to the surety.[7]

The Solicitor General's conclusion is underpinned by his belief that Robertson could not happen again. In view of the magnitude of the FHA construction; of the Defense Department's cost-reimbursable construction contracts, and of the Post Office Department's commercial leasing program, the issues herein are by no means dead, and any state court may do with respect to the notice provisions of the bonds promulgated by the above-mentioned federal agencies as the North Dakota Supreme Court did regarding those provisions of the Capehart bond. Accordingly, there are substantial federal questions and substantial federal interest in this appeal.

The significance of this case radiates through and beyond *res judicata*, spreading to the effect of the decision and

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3(a). The only variance between those bonds and the Capehart bond is that under them a claimant having a direct contract with the principal need not give the notice. However, one in the position of Robertson, which furnished materials to subcontractors of the prime contractor (J.S. 18-19), would be required to give the dual notice.

[6]For convenience of the Court, the applicable regulations and the pertinent portion of the payment bond, similar in important respects to the Capehart bond (J.S. 85-88), are printed in Appendix A hereto.

[7]For convenience of the Court, pertinent portions of such bond are printed in Appendix B hereto.

judgment of the North Dakota Supreme Court in violating the Supremacy Clause of the Constitution and in attempting to subordinate federal legislation and federal agency action to state law. With deference, it is suggested this Court should be ever zealous to frustrate such result and to safeguard the ambit of the Supremacy Clause.

Respectfully submitted,

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APPENDIX A

Volume 4, CCH, Government Contracts Reporter, paragraph 34,164.15, Armed Services Procurement Regulations, Section 10-103.3:

10-103.3 *Waiver of Performance and Payment Bonds.*

(a) The requirement of a performance and payment bond has been waived for all cost-reimbursement type construction contracts. In unusual circumstances, either or both bonds may be required of a prime contractor, subject to approval by the Head of the Procuring Activity. Contracting officers shall, however, require a cost-reimbursement type prime contractor to obtain performance and payment bonds for any fixed-price construction subcontract exceeding $2,000 in accordance with 10-104.1(b).

* * *

Volume 4, CCH, Government Contracts Reporter, paragraph 34,165, Armed Services Procurement Regulations, Section 10-104.1:

10-104.1 *General.*

* * *

(b) Generally, performance and payment bonds shall not be required in connection with contracts other than construction contracts, other than as provided in 10–104.2 and 10–104.3, except that for any fixed-price construction subcontract exceeding $2,000, a prime contractor who has not been required to furnish a payment bond shall be required to obtain a payment bond from his subcontractor, in favor of the prime contractor, in an amount sufficient to assure payment of suppliers of labor and materials. In such a case, a performance bond in an equal amount should also be obtained if available at no additional cost. Subcontract bonds shall not be executed on Standard Forms 25 and 25–A.

The forms set forth in 16–805 (viii) and (ix) are authorized and may be adapted to fit specific cases.

* * *

Volume 4, CCH, Government Contracts Reporter, paragraph 35,220, Armed Services Procurement Regulations, Section 16-805:

* * *

KNOW ALL MEN BY THESE PRESENTS, That we, the PRINCIPAL and SURETY above named, are held and firmly bound unto the Obligee above named, in the amount of the penal sum stated above, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Obligee and the Principal entered into a certain contract identified above, which contract is by reference made a part hereof and is hereinafter referred to as the Contract; and

WHEREAS, performance of the Contract is related to work required under Government Prime Contract_____ the site of such work being in the County of _____, State of _____, being hereinafter referred to as the "place where the work is located."

NOW, THEREFORE, the condition of this obligation is such that if the Principal shall promptly make payment to all claimants as hereinafter defined, for all labor and material furnished in the prosecution of the work provided for in the Contract, then this obligation shall be null and void; otherwise it shall remain in full force and effect. A claimant shall have a direct right of action hereunder against the Principal and the Surety subject to the following conditions:

1. A claimant is defined as one having a direct contract with the Principal or with a subcontractor of the Principal who has furnished labor, material or both, in the prosecu-

tion of work provided for in the contract and who has not been paid in full therefor. Labor and material are construed to include, but are not limited to, that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental of equipment directly applicable to the Contract.

2. The above named Principal and Surety hereby jointly and severally agree with the Obligee that every claimant who has not been paid in full before the expiration of a period of ninety (90) days after the date on which the last of such claimant's work or labor was done or performed or materials were furnished by such claimant, or before the expiration of the period provided by the law of the place where the work is located for the giving of first notice of a lien of the category claimed by the claimant, whichever period be longer, may prosecute the suit to final judgment for such sum or sums as may be justly due the claimant, and may have execution thereon; provided, however, that neither the Obligee nor the assignee of the Obligee shall be liable for the payment of any costs or expenses of any such suit, judgment or execution.

3. The Obligee may assign this instrument and any right it has hereunder to the United States of America or any department or agency thereof without in any way diminishing the obligations of the Principal and Surety hereunder.

4. No suit or action shall be commenced hereunder by any claimant,

a) Unless claimant, other than one having a direct contract with the Principal, shall have given written notice to the Principal and the Surety above named, within ninety (90) days after such claimant did or performed the last of the work or labor, or furnished the last of the materials for which said claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the materials were furnished, or from whom the work or labor was done or performed. Such notice shall be served by mailing the same by registered or certified mail, postage prepaid, in envelopes addressed to the Principal and the

Surety, at any place where an office is regularly maintained by the addressee for the transaction of business, or served in any manner in which legal process may be served in the place where the work is located, save that such service need not be made by a public officer.

b) After the expiration of one (1) year following the date on which Principal ceased work on said Contract. If any period of limitation embodied in this bond is prohibited by any law controlling the construction hereof such limitation shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

c) Other than in a court of competent jurisdiction in and for the state or other political subdivision of the place where the work is located, or in the United States District Court for the district where the work is located, and not elsewhere.

5. The amount of this bond shall be reduced by and to the extent of any payment or payments made in good faith hereunder.

IN WITNESS WHEREOF, the above-bounded parties have executed this instrument under their several seals on the date indicated above, the name and corporate seal of each corporate party being hereto affixed and these presents being duly signed by its undersigned representative pursuant to authority of its governing body.

(See Instructions on Reverse)

POST OFFICE DEPARTMENT

LABOR AND MATERIAL PAYMENT BOND (CONSTRUCTION)

PRINCIPAL *(Name and business address)*	DATE BOND EXECUTED *(Must be same or later than date of Government's acceptance of Agreement to Lease)*
SURETY *(Name and business address)*	CONTRACT IDENTIFICATION
	POST OFFICE *(Branch, station, main PO, etc.)*
ORGANIZED UNDER THE LAWS OF THE STATE OF,	LOCATION *(City, state, ZIP code)*
PENAL SUM OF BOND *(Express in words and figures) (See instruction No. 12 for Penal Sum)*	DATE OF GOVERNMENT'S ACCEPTANCE OF AGREEMENT TO LEASE *(Month, day, year)*

KNOW ALL MEN BY THESE PRESENTS, That we, the Principal and Surety hereto, are held and firmly bound unto the United States of America as Obligee hereinafter called the GOVERNMENT, for the use and benefit of claimants as herein below defined, in the amount of the above penal sum, for the payment whereof Principal and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, Principal has entered into a contract identified above and which contract is by reference made a part hereof, and is hereinafter referred to as the Agreement.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that if the Principal shall promptly make payment to all claimants as hereinafter defined, for all labor and material which prior to occupancy by the Government is used or reasonably required for use in the performance of the Agreement, then this obligation shall be void; otherwise it shall remain in full force and effect, subject, however, to the following conditions:

1. A claimant is defined as one having a direct contract with the Principal or with a general contractor of the Principal, or with a subcontractor in privity with either of them, for labor, materials, or both, used or reasonably required for use in the performance of the Agreement, labor and materials being construed to include that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental of equipment directly applicable to the Agreement.

2. The above named Principal and Surety hereby jointly and severally agree with the Government that every claimant as herein defined, who has not been paid in full before the expiration of a period of ninety (90) days after the date on which the last of such claimant's work or labor was done or performed, or materials were furnished by such claimant, may sue on this bond for the use of such claimant, prosecute the suit to final judgment for such sum or sums as may be justly due claimant, and have execution thereon. The Government shall not be liable for the payment of any costs or expenses of any such suit.

3. No suit or action shall be commenced hereunder by any claimant,

   a) Unless claimant, other than one having a direct contract with the Principal, shall have given written notices to the Principal and to the Surety above named, within ninety (90) days after such claimant did or performed the last of the work or labor, or furnished the last of the materials for which said claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the materials were furnished, or for whom the work or labor was done or performed. Such notices shall be served by mailing the same by registered mail or certified mail, postage prepaid, in envelopes addressed to the Principal and to the Surety at any place where an office is regularly maintained for the transaction of business, or served in any manner in which legal process may be served in the state in which the aforesaid project is located, save that such service need not be made by a public officer.

   b) After the expiration of one (1) year following the date on which claimant did or performed the last of the work or labor, or furnished the last of the materials for which such suit or action is brought, it being understood, however, that if any limitation embodied in this bond is prohibited by any law controlling the construction hereof such limitation shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

   c) Other than in a state court of competent jurisdiction in and for the county or other political subdivision of the state in which the project, or any part thereof, is situated, or in the United States District Court for the district in which the project, or any part thereof, is situated, and not elsewhere.

4. The amount of this bond shall be reduced by and to the extent of any payment or payments made in good faith hereunder, inclusive of the payment by Surety of mechanics' liens which may be filed of record against said improvement, whether or not claim for the amount of such lien be presented under and against this bond.

IN WITNESS WHEREOF, the above-bounden parties have executed this payment bond on the date setforth above.

POD Form 1414-E
Jan. 1965

POD, WASH., D. C.

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INSTRUCTIONS

1. There shall be no deviation from this bond except as authorized by the Assistant Postmaster General, Bureau of Facilities, or his duly authorized representative.

* * *

12. The penal sum of this bond shall be based upon the penal sum of the performance bond submitted herewith. If the penal sum stated in the performance bond is not more than $1,000,000, this payment bond shall be in a sum of one-half the penal sum of the performance bond. If the penal sum stated in the performance bond is more than $1,000,000 and not more than $5,000,000, this payment bond shall be in a sum of 40 per centum of the penal sum of the performance bond. If the penal sum stated in the performance bond is more than $5,000,000, this payment bond shall be in the sum of $2,500,000.

* * *

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GPO 909-599